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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHON BURDETT HIGH,

Defendant and Appellant.

2d Crim. No. B287108
(Super. Ct. No. CR39910)
(Ventura County)

Jonathon Burdett High was convicted of transporting and possessing for sale, 66 grams of cocaine in his car in 1997. (Health & Saf. Code, §§ 11352, 11351.5.)¹ We previously concluded he is not entitled to resentencing on the conviction for transporting cocaine under Proposition 36, the Three Strikes Reform Act of 2012. (*People v. High* (Aug. 26, 2014, B253668) [nonpub. opn.]; Pen. Code, §§ 667 and 1170.12.) The record

¹ All further statutory references are to the Health & Safety Code unless otherwise stated.

supported the trial court’s finding that resentencing would pose an unreasonable risk of danger to public safety.

High now seeks resentencing on the same conviction under Proposition 47, the Safe Neighborhoods and Schools Act, and an amendment adding subdivision (c) to section 11352. He contends he does not pose an unreasonable risk of committing a “super-strike” offense within the meaning of Proposition 47 and that his conviction was obtained without proof of intent to sell, which is now required under the amendment to section 11352.² We conclude that High is not entitled to relief.

The amendment to section 11352 does not apply retroactively to High’s conviction because it was final long before the amendment. Even if it did apply, the jury found beyond a reasonable doubt that he possessed the same cocaine “for sale” when it convicted him of violating section 11351.5. Proposition 47 did not alter drug transportation offenses. This outcome does not offend constitutional principles of equal protection or due process and his sentence is not cruel or unusual. We thus affirm the trial court’s order denying his petition for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, High was arrested on suspicion of driving under the influence and was found to be in possession of cocaine. A jury convicted him of transporting cocaine (§ 11352, subd. (a)) and possessing cocaine for sale (§ 11351.5). The trial court sentenced him to serve 25 years to life in prison for the transportation offense (§ 11352), pursuant to the three strikes law. It also imposed, but stayed pursuant to Penal Code section 654, a 25-year-to-life sentence for the possession for sale (§ 11351.5) and

² Penal Code, § 1170.18, added by Prop. 47, § 14, approved by the voters at the Gen Elec. (Nov. 5, 2014).

struck two Penal Code section 667.5, subdivision (b) prior prison term enhancements.

In 2012, the Three Strikes Reform Act was enacted and in 2013, High petitioned the trial court to resentence him as a second-strike offender under its provisions. (Pen. Code, § 1170.126.) The trial court exercised its discretion to deny resentencing because it found that resentencing him would pose an unreasonable risk of danger to public safety. (*Id.*, subd. (f).) We affirmed. (*People v. High, supra*, B253668.) High's first strike was in 1987 for robbing a person at gunpoint and leading police on a high-speed chase. After release, he violated parole three times. His second strike was for a brutal first degree robbery of four victims involving torture and sexual assault, committed with fellow Crips gang members. While incarcerated, he was cited for multiple disciplinary violations. (*Ibid.*)

In 2013, the Legislature amended section 11352 to define "transports" to mean "transport for sale," (§ 11352, subd. (c)) thus requiring proof of intent to sell to sustain a felony conviction. (Stats. 2013 ch. 504, § 1.) In 2014, the electorate approved Proposition 47, which reduced certain drug-related and theft-related offenses to misdemeanors. (§ 1170.18, subd. (a).) Proposition 47 does not explicitly refer to section 11352 or any other transportation offense.

In 2016, High filed the current petition for resentencing pursuant to Proposition 47. As amended, it argued that his conviction for violating section 11352 should be reduced to a misdemeanor under Proposition 47 and the amendment adding subd. (c) to section 11352, as well as various constitutional principles. He offered declarations of experts to support his contention that he does not pose a risk of danger to the public.

The trial court found High was ineligible for relief and denied his petition.

DISCUSSION

High contends his third-strike offense should be reclassified and his sentence recalled because he has served 22 years of a 25-year-to-life sentence for conduct that would be a misdemeanor under current law or if the cocaine was found while he was in a parked car instead of driving. He acknowledges that Proposition 47 does not apply to section 11352, but he argues the crime was by operation of law no longer a violation of section 11352 inasmuch as the cocaine was not possessed for sale. We disagree.

The 2013 amendment to section 11352 does not apply retroactively to High's 1997 conviction. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1321.) The amendment to section 11352 that added subdivision (c) and requires proof of intent to sell became effective in 2014, many years after High's 1997 conviction was final. "[A]meliorative legislation does not affect convictions that have become final." (*People v. Martinez* (2018) 4 Cal.5th 647, 655 (*Martinez*).)

Even if the amendment did apply, it would afford High no relief. His jury found beyond a reasonable doubt that he transported the same cocaine in the same vehicle on the same occasion for purposes of sale when it convicted him of possessing the cocaine for sale in violation of section 11351.5.

Proposition 47 does not afford High relief because transportation in violation of section 11352 is not among the crimes the electorate declared to be reducible (Penal Code, §§ 1170.18, 1170.126). "Because Proposition 47 did not reduce the transportation of a controlled substance from a felony to a misdemeanor, [High] is ineligible for resentencing on that offense." (*Martinez, supra*, 4 Cal.5th at p. 653.)

In *Martinez*, the Court concluded that Proposition 47 did not reduce a similar transportation offense to a misdemeanor.

The petitioner in that case sought reclassification of his felony conviction for transporting methamphetamine in violation of section 11379. The Court denied relief because Proposition 47's provisions regarding possession offenses "do not redefine or refer to unlawful transportation of controlled substances." (*Martinez, supra*, 4 Cal.5th 647, 653.) It also concluded that a 2013 amendment to section 11379 requiring proof of intent to sell did not apply retroactively to the petitioner's conviction because it was final in 2010. (*Martinez* at p. 655.)

Here too, Proposition 47 did not amend section 11352 and High's offense would not have been a misdemeanor if Proposition 47 had been in effect when he was convicted. Proposition 47 did amend section 11350 (simple possession) but that is not the crime of which he was convicted by a jury who also found he possessed the cocaine for sale. Like the 2013 amendment to section 11379, the 2013 amendment to section 11352 does not apply retroactively to High's 1997 conviction. (*In re Estrada* (1965) 63 Cal.2d 740, 745; *People v. Superior Court (Rodas)*, *supra*, 10 Cal.App.5th at p. 1321.)

We therefore do not reach the People's contention that High is also disqualified from Proposition 47 relief because he poses an unreasonable risk of committing a super-strike offense as evidenced by the brutal nature of his prior robberies and his conduct while incarcerated. (Pen. Code, §§ 1170.18, subd. (b)(1)-(3), 667, subd. (e)(2)(C)(iv); *People v. Valencia* (2017) 3 Cal.5th 347, 351.)

High contends the equal protection clause entitles him to resentencing because his conduct would be a misdemeanor if he had been parked instead of driving. The claim lacks merit because people who transport cocaine are not similarly situated to people who possess it in a parked car. (U.S. Const., 14th amend; Cal. Const. art. 1, § 7.) The crimes are sufficiently

different to justify different treatment. (*Martinez, supra*, 4 Cal.5th at 654 [“it is reasonable to treat drug transportation as a more serious crime than drug possession”]; *People v. Rodgers* (1971) 5 Cal.3d 129, 136 [the Legislature is entitled to assume that potential for harm is greater when drugs are moved from place to place than when they are merely held] superseded by statute on other grounds in *People v. Luna* (2017) 10 Cal.App 5th 1004, 1012.) And “[r]eclassifying drug possession, but not drug transportation, as a misdemeanor is . . . consistent with Proposition 47’s stated goal of reducing punishment for nonserious crimes.” (*Martinez, supra*, at p. 654.)

High’s claim that the trial court violated his right to due process because it did not conduct a hearing is also without merit. (U.S. Const., 14th Amend.) He contends the court did not conduct a hearing because it did not believe he was entitled to relief. The record demonstrates the court did conduct a hearing at which High was present. Although it expressed frustration with the length of the sentence and said, “I have common sense, [but] I don’t have the power to use it in this situation,” it did not deny High a hearing. It “read everything that’s been filed in this case,” and heard the arguments of counsel. It properly concluded that High is ineligible for relief. Its conclusion is correct.

High’s punishment is not grossly disproportionate to his crime in view of the specific circumstances of his case. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17; *Ewing v. California* (2003) 538 U.S. 11, 20-21, 29-30 [A 25-year-to-life Three Strikes sentence for shoplifting golf clubs after convictions for burglaries and a robbery was not cruel and unusual]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-68 [A 50-year-to-life Three Strikes sentence for petty theft with a prior after convictions for residential burglary was not cruel and unusual].) High’s sentence does not shock the conscience or offend fundamental

notions of human dignity, taking into consideration the nature of the offender, the offense, and the punishment for more serious crimes in this jurisdiction and others. (*In re Lynch* (1972) 8 Cal.3d 410, 424, superseded on other grounds in *People v. Caddick* (1984) 160 Cal.App.3d 46, 51.) High was convicted for transporting cocaine and for possessing it for sale, his prior convictions were for violent robberies that involved torture and sexual assault, and he has demonstrated inability to rehabilitate. His crime is more serious than others for which Three Strikes sentences have been upheld to 8th amendment challenges. (e.g., *People v. Ewing*, *supra*, 538 U.S. 11, 20-21 [petty theft of golf clubs with prior]; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1432 [petty theft of magazine with prior]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [petty theft of a pair of pants with priors].)

DISPOSITION

The order appealed from is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jeffrey G. Bennett, Judge
Superior Court County of Ventura

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